MAJLIS PEGUAM MALAYSIA & ORS

v.

RAJA SEKARAN KRISHNAN & OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NOS: W-02-75-2000, W-02-780-2000, W-02-647-2000, W-02-521-2000 & W-02-512-2000]
24 SEPTEMBER 2004

LEGAL PROFESSION: *Bar Council - Extraordinary General Meeting - Resolution to discuss allegations of impropriety made against then Chief Justice - Whether meeting and proposed resolution ultra vires Legal Profession Act 1976 - Whether contemptuous and constituted offences under Sedition Act 1948 - Whether grant of injunction and declaratory reliefs proper by learned judge*

CIVIL PROCEDURE: *Injunction - Injunction restraining Bar Council from convening Extraordinary General Meeting - Resolution to discuss allegations of impropriety made against then Chief Justice - Whether grant of injunction proper by learned judge*

CIVIL PROCEDURE: *Locus standi - Action for injunction - Injunction restraining Bar Council from convening extraordinary general meeting to discuss allegations of impropriety made against then Chief Justice - Whether applicant being a member of the Malaysian Bar had the locus standi to institute action*

CIVIL PROCEDURE: *Trial - Conduct of proceedings - Whether proceedings conducted by way of O. 33 Rules of the High Court 1980 proper*

EVIDENCE: *Admissibility - Privilege - Secrecy of Bar Council proceedings - Whether secrecy protected by s. 76(2) Legal Profession Act 1976 - Whether Evidence Act 1950 applied to admit evidence by member of Malaysian Bar*

LEGAL PROFESSION: *Malaysian Bar - General meeting - Resolution to discuss allegations of impropriety made against then Chief Justice - Whether grant of interlocutory injunction proper by learned judge*

There were five appeals before the court. They arose from two civil suits that were filed by the respondent, a member of the Malaysian Bar against the appellants. The appellants consisted of the Bar Council of Malaysia ('Bar Council'), the former chairman of the Bar Council on behalf of the Executive Committee members thereof including himself, and the Malaysian Bar. The respondent in filing the first suit primarily sought to restrain the Bar Council from convening an Extraordinary General Meeting ('EGM') to discuss allegations of impropriety made against the then Chief Justice. The respondent succeeded in obtaining an interlocutory injunction restraining the Bar Council from convening the EGM. Subsequently, the respondent moved the court under O. 33 Rules of the High Court 1980 ('RHC') on a preliminary issue which was ruled in his favour. The learned judge granted the respondent, *inter alia*, the following reliefs as prayed for: (1) a declaration that the EGM and proposed resolution were *ultra vires* the Legal Profession Act 1976 ('LPA'); (2) a declaration that the EGM and proposed resolution constituted contempt of court; (3) a declaration that the EGM and proposed resolution constituted offences under the Sedition Act 1948; and (4) a permanent injunction restraining the convening of the EGM. In the second suit the respondent, *inter alia*, sought similar reliefs in respect of a proposed general meeting of the Malaysian Bar. The second suit was still pending for trial. In the interim period the respondent obtained an interlocutory injunction against the convening of that meeting which was granted by the same learned judge. The appeals herein were against the decisions of the learned judge in respect of the above.

The issues were: (1) whether the EGM and proposed resolution were *ultra vires* the Legal Profession Act 1976 and constituted contempt of court and offences under the Sedition Act 1948; (2) whether the respondent had the *locus standi* to institute the suits; (3) whether the grant of the interlocutory injunction was proper under the first suit; (4) whether the learned judge should have recused from hearing the application for an interlocutory injunction under the second suit since he had already decided the same or very similar points in the first suit; (5) whether the evidence admitted through the respondent's witness, a member of the Bar Council under the Evidence Act 1950 was proper in view of s. 76(2) LPA; and (6) whether the hearing of the first suit by way of O. 33 RHC was proper when intention and motive were necessary ingredients to prove to establish contempt of court and the offence of sedition.

Held (dismissing the appeals)
Per Richard Malanjum JCA delivering the judgment of the court:

[1] The Bar Council and the Malaysian Bar were creatures of statute and must act and conduct their affairs within the framework of the LPA. Acts or conducts beyond their parameters would be *ultra vires* the LPA. Hence in convening the EGM and general meeting, the Bar Council and the Malaysian Bar must satisfy the court that they were acting within the ambit of the LPA. From the judgment of the learned judge it was obvious that they failed to do so and there was no reason to disagree with such conclusion. Further, the convening of the EGM and general meeting specifically did not meet the requirements of s. 42(1)(d) LPA. There was no evidence adduced to show that there was a request from any quarters to the Bar Council or the Malaysian Bar to express their views or to act or conduct as they did. Further, the act or conduct in convening the EGM and general meeting would undermine the purposes of arts. 125 and 127 of the Federal Constitution. If such act or conduct was unconstitutional to begin with, then the inevitable conclusion would be that it was *ultra vires* the LPA. (pp 260 c-i & 261 a-e)

[2] It was inconceivable that the EGM and general meeting would uphold the cause of justice or protect the public in matters touching or incidental to the law. This was because the nett effect of holding the said meetings was to censure the judiciary whilst permitting discussion on the conduct of His Majesty's judges in flagrant disregard of arts. 125 and 127 of the Federal Constitution. Allowing an open discussion on conduct of His Majesty's judges could amount to questioning the wisdom of the King in his election. Openly criticizing the judiciary could bring about public misunderstanding of the system and would produce unwarranted public misgivings undermining the system. It was not the intention of Parliament when it promulgated the LPA from which the Bar Council and the Malaysian Bar evolved that the same bodies would act contrary to the intent of the legislation and the Federal Constitution. (p 262 e-h)

[3] Anyone who attacks the integrity or impartiality of a court or a judge commits contempt of court. It undermines public confidence in the administration of justice. There was no reason to differ from the learned judge in his finding of contempt. As for the offences of sedition, the convening of the EGM and the adoption of the proposed resolution would clearly constitute an offence under s. 3(1)(c) and 4(1)(a) of the Sedition Act 1948. Therefore the learned judge was correct in law when he allowed the declaration to that effect. (pp 264 f, 266 b, 267 e & 268 b)

[4] On the issue of *locus standi*, the learned judge correctly found that so long as the respondent could show that the conduct of the appellants would put him in peril of a criminal prosecution, he was entitled to the injunction so as to protect his own interest. He need not wait to see the outcome before acting. Further, the respondent being a member of the Malaysian Bar had the *locus standi* to restrain the said body from *ultra vires* acts even if those acts were criminal offences. The question of special damages in such a situation plays a minor role. Nevertheless the respondent had satisfied the 'special damage' test. Being a member of the Malaysian Bar he would be exposed to potential prosecution for sedition and contempt if the EGM and general meeting were to proceed. The fact that he was only one of many members should not negate his standing to sue on his own to ensure that he would not be exposed to unnecessary legal complexities. (pp 269 d-e & 271 c-e)

[5] The law on the grant or refusal of an interim injunction involves the exercise of discretion. The learned judge acknowledged there were serious issues to be tried such as whether the allegations were true or plain hearsay, whether there was any basis to call for the suspension of the then Chief Justice and the consequence of the acts of the appellants. He also considered where the justice of the case should lie and took into account public interest. Given the circumstances of the case, the learned judge exercised his discretion properly in granting the interlocutory injunction under the first suit. (pp 272 d, 274 c-f & 275 b)

[6] The two suits filed by the respondent were founded on two different sets of facts although the points of law might be similar. Further, there was no authority cited before this court enunciating a principle of law that was a basis for the learned judge to recuse from hearing the second suit. The primary questions to consider should be whether there was a real danger of bias on the part of the learned judge and whether the allegation and the factual circumstance could have caused a fair-minded and informed bystander to entertain a fear of a real danger of bias. The appellants' contentions did not bear affirmative answers to those primary questions. Further, the matter before the learned judge in the second suit was only an application for an interlocutory injunction. Any allegation of bias might be premature. (pp 276 f & 277 b-d)

[7] Unless expressly excluded, the provisions of the Evidence Act 1950 apply in any court proceedings. There was no such expressed exclusion in s. 76(2) LPA. Accordingly, ss. 118 and 136 of the Evidence Act 1950 were the provisions in answer to the objection when the witness was called. Further,

there was no provision in the Evidence Act 1950 that allowed a witness to rely on a statutory protection such as that contained in s. 76(2) thereof. (p 279 b)

[8] *Mens rea* is not an element that has to be proved to establish contempt of court. Neither is motive. Since it was only for the purpose of establishing intention or motive that the appellants might call witnesses, the learned judge was right in allowing the invocation of O. 33 RHC. The same applied for sedition. As such, there was no reason to fault the learned judge in proceeding with the hearing of the first suit by way of O. 33 thereof. (pp 280 g-h & 281 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Terdapat lima rayuan di hadapan mahkamah di sini. Rayuan-rayuan tersebut berbangkit dari dua guaman yang difail oleh responden, seorang ahli Bar Malaysia, terhadap perayu-perayu. Perayu-perayu terdiri dari Majlis Peguam Malaysia ('Majlis Peguam'), bekas pengerusi Majlis Peguam selaku wakil Jawatankuasa Eksekutif termasuk dirinya sendiri, dan Bar Malaysia. Dalam memfailkan guaman pertama, responden berhasrat untuk menghalang Majlis Peguam dari meneruskan dengan Mesyuarat Agung Luarbiasa ('EGM') bagi membincangkan dakwaan-dakwaan salahlaku terhadap Ketua Hakim Negara masa itu. Responden berjaya memperoleh injunksi interlokutori menghalang Majlis Peguam dari mengadakan EGM. Berikutan itu, responden menggerakkan mahkamah di bawah A. 33 Kaedah-Kaedah Mahkamah Tinggi 1980 ('RHC') atas suatu isu awalan dan memperoleh keputusan yang berpihak kepadanya. Antara lain, yang arif hakim membenarkan relif-relif berikut kepada responden, iaitu: (1) deklarasi bahawa EGM dan resolusi yang dicadangkan adalah *ultra vires* Akta Profesion Undang-Undang 1976 ('LPA'); (2) deklarasi bahawa EGM dan resolusi yang dicadangkan adalah menghina mahkamah; (3) deklarasi bahawa EGM dan resolusi yang dicadangkan merupakan satu kesalahan di bawah Akta Hasutan 1984; dan (4) injunksi kekal menghalang pengadaan EGM. Dalam guaman kedua, responden antara lain memohon relif-relif yang serupa berkaitan mesyuarat agung Bar Malaysia yang dicadangkan itu. Guaman kedua masih lagi menunggu perbicaraan. Responden, dalam pada itu, telah mendapat injunksi interlokutori terhadap pengadaan mesyuarat tersebut yang diberikan oleh yang arif hakim yang sama. Rayuan-rayuan di sini adalah berkaitan dengan keputusan-keputusan yang arif hakim tersebut.

Isu-isunya adalah: (1) sama ada EGM dan resolusi yang dicadangkan *ultra vires* LPA dan merupakan kesalahan dan penghinaan mahkamah di bawah Akta Hasutan 1984; (2) sama ada responden mempunyai *locus standi* untuk memulai guaman; (3) sama ada pemberian injunksi interlokutori di bawah guaman pertama teratur; (4) sama ada yang arif hakim sepatutnya menolak untuk

mendengar permohonan untuk injunksi interlokutori dalam guaman kedua oleh kerana beliau sudahpun memutuskan perkara yang sama atau yang hampir sama dalam guaman pertama; (5) sama ada keterangan yang diterima masuk melalui saksi responden, seorang ahli Majlis Peguam, di bawah Akta Keterangan 1950 teratur dengan mengambil kira s. 76(2) LPA; dan (6) sama ada pendengaran guaman pertama melalui A. 33 RHC teratur memandangkan niat and motif merupakan ingredien-ingredien perlu untuk dibuktikan bagi penghinaan mahkamah dan kesalahan hasutan.

Diputuskan (menolak rayuan-rayuan)
Oleh Richard Malanjum HMR menyampaikan penghakiman mahkamah:

[1] Majlis Peguam dan Bar Malaysia adalah ciptaan-ciptaan statut dan perlu bertindak dan melaksanakan hal ehwal mereka selaras dengan LPA. Tindakan-tindak atau tingkah laku yang melampaui batasan-batasan ini adalah *ultra vires* LPA. Oleh yang demikian, dalam mengadakan EGM dan mesyuarat agung Majlis Peguam dan Bar Malaysia hendaklah memuaskan mahkamah bahawa mereka bertindak dalam ruang litup LPA. Dari penghakiman yang arif hakim, ianya jelas bahawa mereka gagal berbuat demikian dan tiada alasan untuk tidak bersetuju dengan rumusan berkenaan. Selain itu, pengadaan EGM dan mesyuarat agung secara spesifiknya tidak memenuhi kehendak-kehendak s. 42(1)(d) LPA. Tiada keterangan dikemukakan yang menunjukkan bahawa terdapat permohonan dari mana-mana pihak bagi Majlis Peguam atau Bar Malaysia untuk meluahkan pandangan mereka atau bertindak atau berkelakuan seperti mana yang dilakukan oleh mereka. Lagipun, perbuatan atau tindakan mengadakan EGM atau mesyuarat agung akan menjejaskan kehendak-kehendak fasal-fasal 125 dan 127 Perlembagaan Persekutuan. Jika tindakan atau kelakuan sedemikian tidak berperlembagaan sejak awal-awal lagi, maka satu-satunya konklusi yang ada ialah bahawa ia adalah *ultra vires* LPA.

[2] Adalah tidak mungkin bahawa EGM dan mesyuarat agung akan menegakkan kepentingan undang-undang atau melindungi masyarakat awam berkaitan perkara yang menyentuh atau berkaitan dengan undang-undang. Ini kerana kesan sebenar pengadaan mesyuarat berkenaan adalah untuk mencela badan kehakiman sambil membenarkan perbincangan mengenai kelakuan hakim-hakim Duli Yang Maha Mulia tanpa memperdulikan langsung fasal-fasal 125 dan 127 Perlembagaan Persekutuan. Membenarkan perbincangan terbuka mengenai kelakuan hakim-hakim Duli Yang Maha Mulia adalah seperti mempersoalkan kebijaksanaan perlantikan yang dibuat oleh ke Bawah Duli. Mengkritik badan kehakiman secara terbuka mungkin akan menyebabkan salah faham di kalangan masyarakat kepada sistem, dan mencetuskan kecurigaan masyarakat yang akan menjejaskan sistem. Bukanlah menjadi niat Parlimen, apabila ia menggubal LPA, dari mana

terbentuknya Majlis Peguam dan Bar Malaysia, bahawa badan-badan tersebut akan bertindak secara yang bertentangan dengan niat badan perundangan dan Perlembagaan Persekutuan.

[3] Sesiapa yang menyerang integriti atau kesaksamaan sesebuah mahkamah atau seseorang hakim adalah melakukan perbuatan menghina mahkamah. Ia menjejaskan keyakinan masyarakat kepada pentadbiran kehakiman. Dengan itu tiada alasan untuk tidak menyetujui yang arif hakim dalam dapatannya tentang penghinaan. Mengenai kesalahan menghasut, pengadaan EGM dan penerimaan resolusi yang dicadangkan jelas sekali merupakan suatu kesalahan di bawah s. 3(1)(c) dan 4(1)(a) Akta Hasutan 1948. Yang arif hakim dengan itu betul di sisi undang-undang apabila beliau membenarkan deklarasi yang sedemikian.

[4] Berkaitan isu *locus standi*, yang arif hakim dengan betulnya merumuskan bahawa selagi responden boleh membuktikan bahawa kelakuan perayu-perayu akan mendedahkan dirinya kepada bahaya suatu pendakwaan jenayah, beliau berhak mendapatkan injunksi untuk melindungi kepentingan dirinya. Beliau tidak perlu menunggu kesudahannya sebelum bertindak. Selain itu, responden, selaku seorang ahli Bar Malaysia mempunyai *locus standi* untuk menghalang badan tersebut dari tindakan-tindakan *ultra vires* walaupun tindakan-tindakan tersebut adalah perbuatan jenayah. Dalam keadaan sebegini, persoalan gantirugi khas memainkan peranan yang kecil sahaja. Walaupun begitu, responden telah memuaskan kehendak ujian 'gantirugi khas'. Sebagai seorang ahli Bar Malaysia beliau berkemungkinan terdedah kepada pendakwaan kerana menghina dan menghasut jika EGM dan mesyuarat agung diteruskan. Fakta bahawa beliau hanyalah seorang ahli dari begitu ramai ahli-ahli tidak menjejaskan haknya untuk mendakwa secara bersendirian bagi mempastikan beliau tidak terdedah kepada kesukaran undang-undang yang tidak perlu.

[5] Undang-undang berhubung pemberian atau penolakan injunksi interim melibatkan pelaksanaan budi bicara. Yang arif hakim mengakui bahawa terdapat beberapa isu penting yang perlu dibicarakan termasuklah sama ada tohmahan-tohmahan berkenaan benar atau pun hanyalah pandang dengar, sama ada terdapat asas untuk menuntut penggantungan kerja Ketua Hakim Negara serta akibat-akibat dari tindakan oleh perayu-perayu. Beliau juga mempertimbang di mana letaknya keadilan kes dan telah mengambil kira kepentingan awam. Dalam halkeadaan yang ada, yang arif hakim, dalam memberikan injunksi interlokutori dalam guaman pertama, telah melaksanakan budi bicaranya dengan teratur.

[6] Guaman-guaman yang difailkan oleh responden diasaskan kepada dua set fakta yang berbeza, walaupun soal undang-undangnya mungkin sama. Selain itu, tiada autoriti dikemukakan di mahkamah ini yang menonjolkan prinsip undang-undang yang boleh menjadi asas bagi yang arif hakim untuk tidak mendengar guaman kedua. Persoalan penting yang perlu ditimbang adalah sama ada terdapat bahaya ketidaksamaan yang sebenar pada yang arif hakim dan sama ada tohmahan dan halkeadaan yang ada membolehkan seorang pemerhati yang munasabah dan mengetahui mengambil pandangan bahawa terdapat bahaya ketidakadilan yang sebenar. Hujah-hujah perayu-perayu tidak dapat menjawab secara afirmatif akan persoalan-persoalan ini. Selain itu, halperkara yang berada di hadapan yang arif hakim di dalam guaman kedua hanyalah suatu permohonan untuk injunksi interlokutori. Apa-apa pengataan tentang ketidakadilan mungkin pramatang.

[7] Kecuali jika diketepikan secara jelas, peruntukan-peruntukan Akta Keterangan 1950 terpakai kepada kesemua prosiding mahkamah. Tidak ada pengetepian sebegitu pada s. 76(2) LPA. Dengan itu, ss. 118 dan 136 Akta Keterangan 1950 adalah peruntukan-peruntukan yang menjawab bantahan mengenai masa saksi dipanggil. Selain itu, tidak ada peruntukan dalam Akta Keterangan 1950 yang membenarkan seseorang saksi untuk bergantung kepada perlindungan statutori seperti yang terdapat pada s. 76(2) LPA.

[8] *Mens rea* bukanlah elemen yang mesti ditunjukkan untuk membuktikan penghinaan mahkamah. Oleh kerana kemungkinan perayu-perayu memanggil saksi hanyalah untuk membuktikan niat atau motif, yang arif hakim betul apabila membenarkan pemakaian A. 33 RHC. Kaedah yang sama terpakai kepada hasutan. Oleh itu, tiada sebab untuk mempersalahkan yang arif hakim kerana mendengar guaman pertama melalui A. 33 tersebut.

Case(s) referred to:

Advocate General v. D Seshagiri Rao AIR [1966] Andhra Pradesh 167 ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [2002] 4 CLJ 268 CA ***(refd)***

American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***

Arab Malaysian Finance Bhd v. Meridien International Credit Corporation Ltd London [1993] 4 CLJ 307 SC ***(refd)***

Attorney-General v. Fred Zimmerman & Ors [1986] 2 MLJ 89 ***(refd)***

Bateman's Bay Local Aboriginal Land Council & Anor v. Aboriginal Community Benefit Fund Pty Ltd & Anor 155 ALR 684 ***(refd)***

Beevis v. Dawson [1956] 3 All ER 837 ***(refd)***

Bermuda Cablevision Ltd v. Colica Trust Co Ltd (PC) [1998] AC 198 ***(refd)***

Brahma Prakash v. State of UP AIR [1954] SC 10 ***(refd)***

C Ravichandran Iyer v. Justice AM Bhattacherjee & Ors [1995] 5 SCC 457 ***(refd)***

Crown v. A Rafique & Ors IR (37) [1950] Sind 1 ***(refd)***

DP Vijandran v. Majlis Peguam [1996] 1 CLJ 23 CA ***(refd)***

Gallagher v. Durack [1983] 57 ALJR 191 ***(refd)***
Gouriet v. Union of Post Office Workers [1978] LR 435 ***(dist)***
Government of Malaysia v. Lim Kit Siang [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***
Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA ***(refd)***
Hoole v. Great Western Railway [1867] 3 Ch App 262 ***(refd)***
Jenkin v. Phamaceutical Society of Great Britain [1921] 1 Ch D 392 ***(refd)***
Locabail (UK) Ltd v. Bayfield Properties Ltd & Anor [2000] 1 All ER 65 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(foll)***
Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals [1997] 4 CLJ 253 ***(refd)***
Maju Holdings Sdn Bhd v. Kamala Devi Ramadass & Anor And Another Appeal [2003] 1 CLJ 434 CA ***(refd)***
Malaysia Shipyard & Engineering Sdn Bhd v. Bank Kerjasama Rakyat (M) Bhd [1985] 2 CLJ 427; [1985] CLJ (Rep) 206 SC ***(refd)***
Mohamed Ezam Mohd Nor & Ors v. PP [2001] 4 CLJ 701 FC ***(refd)***
Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 CA ***(refd)***
Murray Hiebert v. Chandra Sri Ram [1999] 4 CLJ 65 CA ***(foll)***
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***
Oh Keng Seng v. PP [1980] 2 MLJ 244 ***(foll)***
Powell v. Kempton Park Racecourse [1897] 2 QB 242 ***(refd)***
PP v. Oh Keng Seng [1979] 2 MLJ 174 ***(foll)***
R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577 ***(refd)***
Raja Segaran S Krishnan v. Bar Council Malaysia & Ors [2000] 5 CLJ 136 HC ***(refd)***
Raja Segaran S Krishnan v. Bar Council Malaysia & Ors [2004] 1 MLJ 34 ***(refd)***
Rondel v. Worsley [1967] 1 QB 443 ***(refd)***
Simpson v. Westminster Palace Hotel Co [1860] 8 HL Cas 712 ***(refd)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 3 MLJ 633 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 2, 118, 123, 136
Federal Constitution, arts. 125, 127
Legal Profession Act 1976, ss. 42(1)(a), (d), (e), (g), 43, 76(2)
Rules of the High Court 1980, O. 33 r. 2
Sedition Act 1948, ss. 3(1)(c), 4(1)(a)

For the appellants - Raja Aziz Addruse (Loh Siew Cheang, Ambiga Sreenevasan, Ranjit Singh, Christopher Leong, Gopal Sreenevasan, James YH Khong & Kelvin Seet); M/s Chooi & Co, M/s Sivananthan
For the respondent - DP Vijandren; M/s DP Vijandran & Assoc

[Appeal from High Court, Kuala Lumpur; Suit Nos: S2-23-93-1999 & S2-23-33-2000]

Reported by Usha Thiagarajah

a

JUDGMENT

Richard Malanjum JCA:

Introduction

There are five appeals before us. They arose from two civil suits, S2-23-93-
b 99 (the first suit) and S2-23-33-00 (the second suit).

Both suits were filed by the respondent herein as plaintiff. But in this judgment he will be referred throughout as the respondent. The defendants in the respective suits are the appellants herein and will collectively be referred to as
c such where appropriate in this judgment. Otherwise the appellants will be referred to by their respective names.

As the background facts and events of these appeals are substantially interrelated we propose to briefly state them first before dealing with the issues and arguments.

d

The Parties

In the first suit the first appellant is the Bar Council, the second appellant was the former Chairman of the Bar Council being sued on behalf of all the Executive Committee members of the Bar Council including himself while the third appellant is the Malaysian Bar. The first and third appellants are bodies
e established under the Legal Profession Act 1976 (the LPA).

The respondent is a member of the Malaysian Bar paying an annual subscription fee of RM350 and such further sums as may be required for the various funds and projects of the Bar Council. Section 43 of the LPA made
f membership to the Malaysian Bar obligatory for anyone wishing to be issued with annual practicing certificate.

In the second suit the first appellant is the Malaysian Bar while the other defendants who did not appeal were formerly members of the Executive Committee of the Bar Council.

g

Brief Backgrounds Of Events

Raja Aziz the lead counsel for the appellants in both suits briefly summarized the object and causes of the suits:

h (a) that in each of the action it sought 'to restrain the Bar Council, Malaysia, from convening and holding an Extraordinary General Meeting to discuss allegations of impropriety made against the Chief Justice who was then in office';

(b) that in the first suit 'the allegations were made in an amended defence filed
i in August 1999 in High Court Civil Suit No. S2-23-43-1996'; and

(c) that in the second suit 'the allegations were similar, and they were reported in the press on 31 May 2000, as having been made by Datuk Dr. Rais Yatim, the Minister in the Prime Minister's Department'.

These appeals relate to the decisions of the same learned High Court Judge in both suits.

In respect of the first suit the appeals are:

(a) W-02-75-04 (Appeal 75) which is against the judgment of the learned judge rendered on 10 November 2003 and effectively disposed of;

(b) W-02-647-00 (Appeal 647) which is against the ruling of the learned judge allowing the application by the respondent for the trial of a preliminary issue pursuant to O. 33 of the Rules of the High Court 1980 ('the Rules'); and

(c) W-02-780-00 (Appeal 780) which is against the dismissal by the learned judge of the preliminary objection on the issue of secrecy of proceedings conducted by the Bar Council.

The first suit was triggered by the move of the Malaysian Bar acting in concert with the Bar Council to call for an Extraordinary General Meeting scheduled on 20 November 1999 at 10am at the Grand Ballroom, Renaissance Hotel Kuala Lumpur. A notice dated 12 October 1999 ('the notice of 12 October 1999') containing a proposed resolution of even date ('the proposed resolution of 12 October 1999') was thus issued. The respondent received a copy of the same. For convenience, in this judgment unless stated otherwise any reference to 'the proposed EGM' includes the aforementioned notice of 12 October 1999 and the proposed resolution of 12 October 1999.

The main purpose of the proposed EGM was to consider and to adopt if approved the proposed resolution of 12 October 1999 which read: 'That the Bar Council is to forthwith bring to the attention of the appropriate authorities all relevant instances of controversy that have undermined confidence in the Malaysian Judiciary and to do all that is necessary to pursue the appointment of a Royal Commission of Inquiry to make such inquiries and recommendations as may be appropriate to ensure that confidence in the Malaysian Judiciary is fully restored'.

The reasons for tabling the proposed resolution of 12 October 1999 were stated in the notice of 12 October 1999 and in this fashion:

2. The Malaysian Bar:

(a) understands that serious allegations of impropriety have been made against certain members of the Judiciary; and

(b) is gravely concerned with judicial development and pronouncement in certain important branches of the law such as the law of contempt and the law of defamation, and with the administration of justice generally.

3. It is the grave concern of the Malaysian Bar that by reason of these allegations, developments and pronouncements confidence in the independence, integrity and competence in the Judiciary has been undermined to the detriment of the rule of law in Malaysia.

On 2 November 1999 the respondent wrote to the Bar Council requesting that the proposed EGM be called off. However the Bar Council did not accede to his request. Hence the respondent filed the first suit on 9 November 1999.

The prayers sought for in the first suit (as amended) were as follows:

(a) For a Declaration that the said EGM and the said proposed resolution are *ultra vires* the Legal Profession Act 1976.

(b) For a Declaration that the said EGM and the said proposed resolution constitute contempt of court.

(c) For a Declaration that the said EGM and the said proposed resolution constitute offences under the Sedition Act 1948.

(d) For an interim injunction to restrain the defendants either by themselves and/or their servants and/or agents from holding the said EGM on 20 November 1999;

(e) a permanent injunction to restrain the defendants either by themselves and/or through their servants and/or their agents from holding and/or causing to be held any further similar meetings with the same or similar purposes.

(f) damages;

(g) costs;

(h) any further and or other relief as this Honourable Court deem fit and proper to grant.

Pending the trial of the first suit the respondent filed an application for an interlocutory injunction while the appellants applied for the suit to be struck out. After hearing these applications the learned judge allowed the application

by the respondent but dismissed the application by the appellants. Appeals against both the decisions of the learned judge were subsequently lodged with this court. However on 12 July 2000 both appeals were dismissed.

On 26 July 2000 the respondent filed an application under O. 33 of the Rules for a preliminary issue to be tried. On 5 September 2000 the learned judge ordered the following issue to be tried, namely:

> Whether the proposed Resolution dated 12th October 1999 as contained in the Notice dated 12th October 1999 and the proposed Extraordinary General meeting on the Malaysian Bar to be held on 20th November 1999 were *ultra vires* the powers and objects of the Malaysian Bar under the Legal Profession Act 1976 in that:
>
> (a) The Resolution and Extraordinary Meeting are not within the powers and/or objects of the Malaysian Bar under the Legal Profession Act 1976.
>
> (b) The Resolution and the Meeting and the participation of both Council and Ordinary members therein constitute Contempt of Court and/or are seditious and/or are unconstitutional.

In respect of the first suit there were therefore three issues to be tried before the learned judge. In his judgment delivered on 10 November 2003 (see: *Raja Segaran a/l S Krishnan v. Bar Council Malaysia & Ors* [2004] 1 MLJ 34) the learned judge answered all of them in the affirmative and subsequently gave the following reliefs to the respondent:

(a) A Declaration that the said EGM and the said proposed resolution are *ultra vires* the Legal Profession Act 1976.

(b) A Declaration that the said EGM and the said proposed resolution constitute contempt of Court.

(c) A Declaration that the said EGM and the said proposed resolution constitute offences under the Sedition Act 1948.

[(d) Interim injunction earlier granted on 19.11.99.]

(e) A permanent injunction to restrain the Defendants either by themselves and/or through their servants and/or their agents from holding and/or causing to be held any further similar meetings with the same or similar purposes.

(f) Damages to be assessed by the learned Deputy Registrar.

(g) Costs.

In respect of the second suit it was filed as a result of two events, namely, the letter issued on or about 7 June 2000 and amended on 8 June 2000 by the then Secretary of the Bar Council to all its members and the public statement purportedly released by the Chairman of the Bar Council in connection with a proposed general meeting of the Malaysian Bar scheduled on 23 June 2000. For convenience in this judgment in relation to the second suit any reference to the proposed general meeting includes any resolution to be tabled for discussion thereat. And the allegation or statement that prompted to convene the proposed general meeting is referred to in para. 7(c) hereinabove.

The respondent asserted that on 12 June 2000 he wrote to the Malaysian Bar and to the Executive Committee of the Bar Council requesting that the proposed general meeting be called off and gave them 48 hours to respond.

However *vide* a faxed letter dated 13 June 2000 from the Secretary of the Bar Council the respondent was informed that the proposed general meeting would proceed as scheduled.

And on 15 June 2000 the Executive Committee of the Bar Council caused to be issued a notice on the proposed general meeting by way of an advertisement in the newspapers.

Hence the second suit, which until to-date is still pending for trial, was filed on 19 June 2000 seeking for the following relief:

(a) For a Declaration that the purported notice is wrongful, illegal, invalid, null and void and/or contrary to the Legal Profession Act;

(b) For a Declaration that the convening of the said general meeting is wrongful, illegal, invalid, null and void and/or contrary to the Legal Profession Act;

(c) For a Declaration that the said general meeting and the said proposed resolution and the publication of the purported notice in the press are *ultra vires* the Legal Profession Act 1976;

(d) For a Declaration that the said public statement and the said proposed resolution and the said proposed general meeting and the publication of the purported notice in the press constitute contempt of Court;

(e) For a Declaration that the said public statement and the said proposed resolution and the said general meeting and the publication of the purported notice in the press constitute offences under the Sedition Act 1948;

(f) For an interlocutory injunction to restrain the Defendants either by themselves and/or their servants and/or agents from holding the said general meeting on 23.06.2000;

(g) a permanent injunction to restrain the Defendants either by themselves and/or through their servants and/or their agents from holding and/or causing to be held any further similar meetings with the same or similar purposes that constitutes contempt and/or an abuse of power;

(h) damages;

(i) costs;

(j) any further and or other relief.

An application for interlocutory injunction was also filed in relation to the second suit. It was heard by the same learned judge for the first suit. A preliminary objection was raised by the appellants but that was dismissed. Civil appeal W-02-512-2000 (Appeal 512) is an appeal to this court against that dismissal. And after hearing the parties the learned judge ruled thus:

> I therefore grant the plaintiff an order injuncting the 1st defendant or its servants or agents from convening the extraordinary general meeting fixed for 23 June 2000. I also order that the 1st defendant to pay the plaintiff the costs of this application to be taxed.

Civil appeal W-02-521-00 (Appeal 521) herein is an appeal against the granting of the interlocutory injunction.

The Hearing

At the outset of hearing of these appeals some confusion arose in that the appellants in Appeal 512 intimated their intention to withdraw it contending that the issues therein are also in Appeal 521. However learned counsel for the respondent asked for costs. That halted the appellants from formally withdrawing the same. As such all the appeals remained before this court.

The Issues For Determination

Raja Aziz submitted that the grounds relied upon by the respondent in the first suit and partly in the second suit were:

(1) that the proposed resolutions to be discussed at the Meeting were *ultra vires* the Legal Profession Act 1976;

(2) that the Meeting and the proposed resolutions constituted contempt of court;

(3) that the Meeting and the proposed resolutions constituted offences under the Sedition Act, 1948.

And Raja Aziz listed the issues of law raised in those grounds as follows:

(1) whether the plaintiff (Respondent herein) had the locus standi to institute the proceeding or, by way of corollary, whether the court had the jurisdiction to entertain the action;

(2) whether the court had the jurisdiction to make the declarations prayed for; and

(3) whether the court had the jurisdiction to restrain the convening and holding of the Meeting (ie, the proposed EGM).

In relation to Appeal 647 Raja Aziz submitted that although the learned judge allowed the first suit to be tried on preliminary issue under O. 33 he nevertheless erroneously proceeded to allow witnesses to be called.

Dato' Loh Siew Cheang learned counsel for the appellants in Appeal 512 which was related to the second suit, submitted on the failure by the learned judge despite objection lodged to recuse himself from hearing the application. Learned counsel maintained that the issue remained a live issue.

And Ms Ambiga Sreenevasan learned counsel for the appellants in Appeal 780 dealt with the issue of secrecy of proceedings conducted by the Bar Council citing s. 76(2) of the LPA.

Mr. D.P. Vijandran learned counsel for the respondent in his response to the respective submissions of learned counsel for the appellants addressed each of the issues raised. He also submitted on the jurisdiction and the principles of law the High Court must consider before granting an interlocutory injunction. In respect of Appeal 521 learned counsel highlighted the fact that there was no appeal on the issues now raised. Hence he argued that this court should only be concerned with whether the interlocutory injunction was correctly given. Indeed Raja Aziz was also of the same mind when he said that '*ultra vires* point was not considered at all by the learned judge; and there being no cross-appeal against the decision of the High Court, that issue does not arise in Appeal 521'.

Anyway, in summary the main issues to be determined in these appeals are thus:

(i) *ultra vires* – whether the actions of the Bar Council and the Malaysian Bar in calling for the proposed EGM and proposed general meeting were *ultra vires* the LPA;

(ii) *locus standi* – whether the respondent had the locus standi to institute the suits;

(iii) whether the High Court had the jurisdiction to grant the relief sought for in the suits and/or the interlocutory applications *vis-à-vis* contempt of court and the offence of sedition;

(iv) recusal point – whether it was correct for the learned judge not to disqualify himself from hearing the suits and applications related thereto;

(v) secrecy – whether the learned judge was correct in refusing to recognize s. 76(2) of the LPA as providing the shield of secrecy of all proceedings conducted by the Bar Council; and

(vi) the application of O. 33 of the Rules.

Appeals 75 And 521

We propose to deal with Appeal 75 and Appeal 521 together in relation to the first three issues in seriatim and thereafter consider the other appeals including W-02-647-00. Initially we were inclined to deal first with the question of *locus standi* since it might be the determining factor in these appeals. But on further consideration we find that the three issues are very much intertwined. Thus, it would be quite pointless to deal with that issue if in the first place the act and conduct of the Appellants complained of by the respondent could not be held to be *ultra vires* the LPA, contemptuous or seditious. We resolve therefore to deal with these three issues before addressing the question of *locus standi* of the respondent.

Ultra Vires

(i) The Contentions

On the issue of *ultra vires* Raja Aziz submitted three basic points for both the Appeals 75 and 521. The first is the role of the Bar under common law in the administration of justice. The second is on the legal implications of arts. 125 and 127 of the Federal Constitution ('the Constitution') and the third is on s. 42(1)(d) of the LPA. He did not agree that the issues of contempt and sedition should be part and parcel of the point on *ultra vires*. He argued that just because a statement or an act might be contemptuous or seditious should not render the same to be *ultra vires*. And he went to ask whether the Bar should stand idly when judges misconduct themselves.

To elaborate his first point Raja Aziz submitted that 'it has long been acknowledged and emphasized by eminent judges that members of the Bar and judges are each an integral part of the proper administration of justice.' He cited the case of *Beevis v. Dawson* [1956] 3 All ER 837; *Rondel v. Worsley* [1967] 1 QB 443; *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)* [1999] 1 All ER 577.

And he went on to say that members of the Bar are 'expected to have competency and integrity and to act without fear or favour in representing their clients' cause subject only to their duty to justice' while judges' tasks 'are even more onerous in that in addition to being competent independent and impartial, they must be persons of impeccable integrity because if their integrity is suspect, their independence and impartiality will equally be suspect'. Learned counsel also submitted that such expectation of the Judiciary and standard of conduct and behaviour expected of judges are found in the 'Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region' as well as in 'the Bangalore Principles of Judicial Conduct'.

To paraphrase his first point, learned counsel seemed to suggest that members of the Bar are equally responsible to ensure for an independent Judiciary and proper administration of justice. His complaint therefore is that in such context the learned judge failed to appreciate the reasons for the convening of the proposed EGM and the proposed general meeting.

In passing Raja Aziz pointed out that the learned judge appeared to have two distinct views on the statements which respectively prompted the filing of the two suits. He said that in the first suit the learned judge did not question the accuracy of the statement yet the calling for the proposed EGM was ruled ultra vires the LPA. But in the second suit (Appeal 521) Raja Aziz said that the learned judge ruled to be hearsay the statements attributed to Dato' Dr. Rais Yatim which was the reason for the calling of the proposed general meeting.

And specific to Appeal 75 on the issue of *ultra vires* learned counsel argued that the Bar Council by reason of its role in the administration of justice was not 'acting *ultra vires* the LPA in calling for the EGM on each of the two occasions when the allegations against the Chief Justice surfaced'.

Learned counsel also submitted on the ambit and implications of arts. 125 and 127 of the Constitution and the construction of s. 42(1)(d) of the LPA being an ambiguous provision. He contended that the two constitutional Articles should not be interpreted as having precluded any discussion on the conduct of judges.

In respect of Appeal 521 on the same issue learned counsel contended that the learned judge misdirected himself when he ruled that 'there was no need for him to ask the plaintiff to even go into the merits of his application' after concluding that 'there is no basis for the Malaysian Bar to contend that there were allegations made by Datuk Dr Rais Yatim' by reason of the same being hearsay evidence. Learned counsel thus submitted:

(i) that it was for the respondent 'to satisfy the court that the Bar Council was not entitled in law to convene' the proposed general meeting on the basis of Dato' Dr Rais Yatim's reported statements;

(ii) that the burden was also on the respondent and which was not discharged 'to show why the decision of the Bar Council to call' for the general meeting was *ultra vires*' the LPA; and

(iii) that the '*ultra vires* point was not considered at all by the learned judge; and there being no cross-appeal against the decision of the High Court, that issue does not arise'.

Mr. DP Vijandran on the issue of ultra vires in respect of both Appeal 75 and Appeal 521, though not raised in the latter, submitted that the case of the respondent is not about the Judiciary but about the Bar Council and the ambits of its powers under the LPA, specifically on sub-s. 41(1)(a)(e) and (g) thereof. And he also contended that the Bar Council and the Malaysian Bar are creatures of statute, that is, the LPA, hence their actions must therefore be in conformity with the statutory provisions. In particular it was argued that s. 42 of the LPA could not be relied upon to justify the convening of the proposed EGM and the proposed general meeting.

In summary, Mr. Vijandran contended that the proposed EGM and the proposed general meeting would be *ultra vires* the LPA in that:

(a) the LPA does not empower the holding of the proposed EGM;

(b) the proposed EGM breaches specific provisions of the LPA;

(c) the proposed EGM is unconstitutional, illegal and void;

(d) the proposed EGM constitutes contempt and expose 'Bar members to committal for contempt and expenditure of funds to defend against committal proceedings'; and

(e) the proposed EGM exposes the Bar and its members to charges under the Sedition Act.

Despite Raja Aziz having expressed his preference to have the issues of contempt and sedition dealt with separately Mr. Vijandran nevertheless emphasized that in raising the issues of contempt and sedition the thrust of the respondent's case is not 'to establish illegality *per se* but to establish the *ultra vires* nature' of the proposed EGM and the proposed general meeting. And he listed the implications arising from the proposed resolution of 12 October 1999 in that:

(a) the words used therein would have the effect of undermining the integrity, independence and competence of the Judiciary;

(b) it expressed no confidence in the Judiciary; and

(c) it called for Royal Commission of Inquiry into the Judiciary.

Learned counsel submitted that each of the above implications could constitute contempt.

On the issue of sedition it was the contention of Mr. Vijandran that the proposed EGM and the proposed general meeting would contravene s. 3(1)(c) of the Sedition Act 1948 in that it has a 'seditious tendency ... (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State'. Furthermore judges are appointees of the Yang diPertuan Agong. Hence the purpose of the proposed EGM and the proposed general meeting is to arraign His Majesty's Judges and that would tantamount to questioning the appointing authority of the King.

Mr. Vijandran also submitted that the proposed general meeting and the proposed EGM which included the call for the appointment of a Royal Commission of Inquiry would be unconstitutional hence *ultra vires* the LPA in view of arts. 125 and 127 of the Constitution.

(ii) The Finding Of The High Court

In respect of the first suit the learned judge, having heard the witnesses called and the submissions of learned counsel for the parties and after examining the materials before him, made the following findings, *inter alia*:

(a) that serious allegations of impropriety were made against certain members of the Judiciary as contained in the notice of 12 October 1999 and the proposed resolution of 12 October 1999 yet the Bar Council and the Malaysian Bar did not take any responsibility to determine whether such allegations were factual. Instead they were indifferent to their truth;

(b) that the Bar Council and the Malaysian Bar are creatures of statute, that is the LPA. Hence it is therefore imperative that they recognize this fact and act with concern when making statements due to their unique positions;

(c) that sub-s. 42(1) (d) of the LPA confines the Bar Council and the Malaysian Bar to express their views on matters affecting the administration of law 'only if requested so to do';

(d) that the Bar Council and the Malaysian Bar have no power to discuss the conduct of judges and any attempt to do so would be contrary to art. 127 of the Constitution; and

(e) that the call for the setting up of a Royal Commission of Inquiry is clearly contrary to art. 125 of the Constitution which provides for the mode of removal of a judge.

(iii) The Finding Of This Court

In view of the stand adopted by Raja Aziz and in order to avoid unnecessary confusion in the sequence of our reasons we will consider the issues of contempt and sedition separately from the issue of *ultra vires*.

From the submissions of Raja Aziz it would appear that the ground relied upon for the convening of the proposed EGM and the proposed general meeting was on the rationale 'that members of the Bar and judges are each an integral part of the proper administration of justice'. And he went on to argue that it should be for the respondent to show why the Bar Council and the Malaysian Bar could not convene those proposed meetings.

We note that the issue of *ultra vires* was also submitted during the hearing of the application for an interlocutory injunction in relation to the first suit. In his judgment when allowing the application the learned judge said, *inter alia*:

> It would seem, from a perusal of the LPA that each of these sub-paragraphs is based on s. 41(1)(a), (e) and (g) respectively of the LPA. To my mind none of these sub-sections can be said to provide the defendants with a right to propose the resolutions in question. In fact sub-para. (e) seems to cast upon the defendants the duty to ensure that they conduct themselves "in any proper manner". In my judgment acting *ultra vires* the provisions, namely, to by-pass art. 125 of the Federal Constitution and to call for a Royal Commission of Inquiry clearly does not fall within any of the objects and powers conferred upon the Bar pursuant to s. 42 of the LPA. In fact with regard to sub-para. (e) far from protecting the members' interest the defendants are exposing their members to possible charges of contempt and sedition. If the defendants cannot slot their case within any of the provisions of s. 42, then clearly their conduct is *ultra vires*. Obviously the plaintiff being a member of the 3rd defendant has a right to act to sue to restrain the defendants from committing an act which is *ultra vires*. (See: *Raja Segaran a/l Krishnan v. Bar Council Malaysia & Ors* [2000] 5 CLJ 136).

On appeal against the granting of the interlocutory injunction a differently constituted panel of this court agreed with the conclusion of the learned judge and went on to say this, *inter alia*:

> The respondent also argued that the proposed EGM and the proposed resolution are *ultra vires* the powers conferred to the appellants pursuant to the Legal Profession Act 1976 (LPA). The learned judge agreed with the respondent. He stated his reasons for agreeing so. He cited authorities that go to support his conclusions. We find that the learned judge had not erred

> in law and facts on this *"ultra vires"* issue. We would, however, go a step further to say that this act of the Bar in trying to convene the EGM to discuss that proposed resolution is in fact an illegality. This is because the LPA does not contain any provisions to enable them to do that act. And Article 127 of the Federal Constitution clearly empowers the Parliament to discuss the conduct of judges." (See: Rayuan Sivil No. W-02-47 Tahun 2000 and Rayuan Sivil No. W-02-48-Tahun 2000).

We have no reason to disagree with the above views. However lest we might be misunderstood, we are not saying for a moment that we consider ourselves necessarily bound by a decision of another panel of this court even on a same issue.

Having given our serious consideration to the opposing arguments submitted on the issue of *ultra vires* we are of the opinion that there is much force in the contention that being creatures of statute the Bar Council and the Malaysian Bar must act and conduct their affairs within the framework of the LPA. Acts or conducts beyond its parameters would be *ultra vires*. Hence in convening the proposed EGM and the proposed general meeting the Bar Council and the Malaysian Bar must be able to satisfy the court that they were acting within the ambit of the LPA. From the judgment of the learned judge it is obvious that they failed to do so. Thus, we have no reason to disagree with such conclusion.

Specifically we agree that the convening of the proposed EGM and the proposed general meeting does not meet the requirements of sub-s. 42(1)(d) of the LPA which reads:

> (d) where requested so to do, to express its view on matters affecting legislation and the administration and practice of the law in Malaysia;

There was no evidence adduced during the trial in respect of the first suit that there was a request from any quarters for the Bar Council or the Malaysian Bar as a statutory body to express their views or to act or conduct as they did. We do not think the Bar Council and the Malaysian Bar can legally be entitled to say that they have the right or even the privilege to act or conduct as they did notwithstanding the constraints in the LPA. And we cannot agree that the sub-section is ambiguous. As to who should request for their views is of course another issue but surely it has to come from a relevant and proper authority and not from any busybody.

We have no doubt in the rationale of the general principle of law pertaining to the role of the Bar in the administration of justice as submitted by Raja Aziz. But as stated earlier the Bar Council and the Malaysian Bar are creatures of the LPA and as such they must act and conduct their activities within the four corners of the statute. That is a settled law applicable to any legal

personality. (See: *Malaysia Shipyard & Engineering Sdn Bhd v. Bank Kerjasama Rakyat (M) Bhd* [1985] 2 CLJ 427; [1985] CLJ (Rep) 206 SC). And in *DP Vijandran v. Majlis Peguam* [1996] 1 CLJ 23 this court said at p. 39:

> The Bar Council is a creature of statute. It has only those powers that are conferred upon it by the LPA. Whenever its actions are challenged, the onus lies upon it to demonstrate under what provision of the LPA it purports to act.
>
> As a creation of statute, the Bar Council has been conferred with certain powers to manage and administer its affairs. These are all general in nature and they are to be found in Pt V of the LPA, and more particularly in ss. 56 and 57 thereof. As was put to counsel in the course of argument, ss. 56 and 57 of the LPA are to the Bar Council what a memorandum of association is to a limited company – nothing less, nothing more.

We are also inclined to accept the view of this court expressed in relation to the appeal against the granting of the interlocutory injunction in respect of the first suit and reproduced herein. In particular we accept the argument that the act or conduct in convening the proposed EGM and the proposed general meeting would be contrary to or undermine the purposes of arts. 125 and 127 of the Constitution. If such act or conduct of the Bar Council and the Malaysian Bar were unconstitutional to begin with the inevitable conclusion is that they are *ultra vires* the LPA. It cannot be said or even imagined that the LPA permits an unconstitutional act or conduct of its creatures.

Sub-section 42(1) (a), (d), (e) and (g) of the LPA read:

> 42 Object and powers of the Bar
>
> (1) The purpose of the Malaysian Bar shall be:
>
> (a) to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour;
>
> (b) …;
>
> (c) …;
>
> (d) where requested so to do, to express its view on matters affecting legislation and the administration and practice of the law in Malaysia;
>
> (e) to represent, protect and assist members of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia;

(f) …;

(g) to protect and assist the public in all matters touching ancillary or incidental to the law;

Raja Aziz did not dwell much on the scope of the above. However, we agree with Mr. Vijandran that the act or conduct of the Bar Council and the Malaysian Bar in proposing to convene the proposed EGM and the proposed general meeting could not be within any of the sub-paragraphs. For instance sub-para. (a) refers 'to uphold the cause of justice' which would cover a situation where an advocate and solicitor being an officer of the court is duty-bound to inform a client of a court order and the knowledge of the advocate and solicitor acting for the client would be imputed to the client. (See: *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 3 MLJ 633). The learned judge in his judgment when allowing an application for an interlocutory injunction in relation to the first suit held that sub-paragraph (e) would appear to cast upon the Bar Council and the Malaysian Bar the duty to ensure that they conduct themselves 'in any proper manner'. However by-passing art. 125 of the Constitution and calling for a Royal Commission of Inquiry were ruled by the learned judge to be a conduct not in any proper manner and *ultra vires* the sub-paragraph. (See: *Raja Segaran a/l Krishnan v. Bar Council Malaysia & Ors* [2000] 5 CLJ 136). We are inclined to agree with such view.

In our opinion it is inconceivable to say that the proposed EGM and the proposed general meeting would be upholding the cause of justice or to protect the public in matters touching or incidental to the law when the nett effect is to 'censure' the Judiciary while permitting discussion on the conduct of His Majesty's Judges in flagrant disregard to arts. 125 and 127 of the Constitution. There is much to say in support of the wisdom of art. 127.

Allowing an open discussion on conduct of His Majesty's Judges could amount to questioning the wisdom of the King in his selection. Further the Judiciary thrives on the public confidence in the system. Openly criticizing the Judiciary could bring about public misunderstanding of the system and would then produce unwarranted public misgivings. If that is not undermining the system we do not know what is. And we are inclined to agree with the learned Judge that the acts of the Bar Council and the Malaysian Bar could not be described otherwise than being unconstitutional. Surely it must not have been the intention of Parliament when it promulgated the LPA from which the Bar Council and the Malaysian Bar evolved that the same bodies would act contrary to the intent of the legislation and the Constitution. Indeed there is much to say in support as was also indicated in the earlier judgment of this Court of what the learned judge in *C. Ravichandran lyer v. Justice A.M. Bhattacherjee & Ors.* [1995] 5

SCC 457 at p. 472 said:

> In other words, the Constitution does not permit any action by any agency other than the initiation of the action under Article 124(4) by Parliament.
>
> …
>
> By necessary implication, no other forum or fora or platform is available for discussion of the conduct of Judge in the discharge of his duties as a Judge of the Supreme Court or the High Court, much less a Bar Council or group of practising advocates. They are prohibited to discuss the conduct of a Judge in the discharge of his duties or to pass any resolution in that behalf …

Hence, we find no merit in the contentions of the appellants on the issue of *ultra vires* and in law we cannot fault the learned judge when he allowed the relief sought for in respect of the first suit, namely, 'a Declaration that the said EGM and the said proposed resolution are *ultra vires* the Legal Profession Act 1976'.

And for completeness we note that in respect of Appeal 521 it is common ground that the issue of *ultra vires* did not appear to have a role in the mind of the learned judge when he allowed the application. Nevertheless, we are of the mind that our views on the issue in respect of Appeal 75 are equally applicable and we so hold. The correctness on the grant of the interlocutory injunction is another issue which we will deal later.

Contempt

We have already summarized hereinabove the argument of Mr. Vijandran on the issue of contempt. To recap he submitted, inter alia, that if the convening of the proposed EGM could amount to contempt of court then the act or conduct of the Bar Council and the Malaysian Bar in convening it must be ruled *ultra vires*. Learned counsel then proceeded to show how such act or conduct could amount to contempt of court.

Raja Aziz addressed the issue by questioning the *locus standi* of the respondent in raising it. He complained that the learned judge relied on the facts of the cases cited instead of applying the legal principles. In addition learned counsel contended that in coming to his finding of contempt the learned judge failed to consider several questions, namely, whether it was even more crucial to maintain the independence and impartiality of the Judiciary in that judges whether individually and collectively must strive to enhance and maintain confidence in the judicial system; whether the decision of the Bar Council and the Malaysian Bar to convene the proposed EGM and the proposed general meeting was consistent with their role as equal partner of the Judiciary in the proper administration of justice, having regard to the serious allegations of impropriety made and whether the allegations made against the then Chief Justice as stated

in sub-para. 7(b) hereinabove merited looking into. Learned counsel also submitted that the learned judge erred in subjecting to close scrutiny the notice of 12 October 1999 issued by the Bar Council in connection with the proposed EGM and then making a finding that it was the Bar Council that was undermining the public confidence in the Judiciary.

Hence, the question for us to consider is whether the learned judge was correct in his finding in respect of contempt of court being committed if the proposed EGM were to proceed. And although the issue was not raised in the interlocutory application under the second suit our determination on the issue would equally apply if necessary.

In coming to his finding (see: *Raja Segaran a/l S Krishnan v. Bar Council Malaysia & Ors* [2004] 1 MLJ 34 para. 30) the learned judge referred to some of the cases cited by learned counsel for the respondent in submission, namely, *Attorney-General v. Fred Zimmerman & Ors* [1986] 2 MLJ 89 and *Gallagher v. Durack* [1983] 57 ALJR 191.

In the first case it was the view of the Singapore High Court that certain statements made in the 'The Asian Wall Street Journal' were irresponsible and offensive 'statements calculated to bring the Judiciary of Singapore into contempt or to lower its authority. The statements in so many words question the integrity and impartiality of the courts. The outrageous allegation made in them is that our courts are not independent, that they do not decide on the evidence, the law and the arguments openly placed before them, and that they are influenced by outside considerations, in particular that the courts can be dictated to by the Government. The statements are clearly calculated to undermine public confidence in the proper functioning of our courts.

… In the context of these proceedings, anyone who attacks the integrity or impartiality of a court or a judge commits contempt of court. The reason is simple. It undermines public confidence in the administration of justice.' per Sinnathuray J at 91. With respect we see no reason why the learned judge should not be allowed to draw a parallel finding in the case before him. We are therefore unable to agree with Raja Aziz that the learned judge erred in only applying the facts of those cases instead of the principles therein. After all what amounts to contempt of court in this country is also very much a question of fact and guided by common law principles. (See: *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401).

In ruling that the notice of 12 October 1999 and the proposed resolution of 12 October 1999 were contemptuous the learned judge said, *inter alia* (see: *Raja Segaran a/l S Krishnan v. Bar Council Malaysia & Ors* [2004] 1 MLJ

34):

> With regard to 1(a) of the Notice, counsel argued that the first defendant was transgressing the very essence thereof by acting *ultra vires* the LPA. Whilst agreeing with the contents of 1(b) he likened 1(c) to Brutus stabbing Caesar. His interpretation of 1(c) was that if the judiciary is to be what it is to be, then what it needs is independence, integrity and competence.
>
> [25] But 2(a) Mr Vijandran says, is the stab by Brutus. In a glib statement worthy of crafty lawyership he alleges that the Bar had descended into a nebulous and uncertain position by using the word 'understands'.
>
> [26] To my mind, the language used seems to suggest that it was a fact that serious allegations of impropriety have been made against certain members of the judiciary. However, by using the word 'understands' it was clear that the defendants, whilst insidiously suggesting a fact, yet are not taking responsibility for asserting such a fact.
>
> ...
>
> [33] … the Malaysian Bar must accept the fact that it is a voice that is heard by the public. It acts as a regulator. It must also act as a moderator.
>
> [34] Independence of the judiciary is the cornerstone of judicial functions. If this is attacked then the system of administration of justice is destroyed.
>
> …
>
> [71] … In the case before me, the plaintiff contends that he is a member of the Bar and if the Bar is guilty of contempt or sedition, he too, as a member of the Bar, could be guilty of the same. What the plaintiff is attempting to do is to show that if the meeting is held to consider the Resolution, the participants, including he, can be found guilty of such an offence, and he wants to avoid that … So long as the plaintiff has shown that he has the locus to make the application and so long as he can show that the conduct of the defendants is such as to put him, the plaintiff, in peril of such similar prosecution that the defendants could face if the defendants' act is allowed to be consummated, the plaintiff need not wait to see the outcome, before acting. To protect his own interest he can take out an injunction to restrain the defendants and if the court is satisfied that the act complained of could give rise to the plaintiff facing criminal prosecution, the plaintiff ought to be allowed to use injunctive measures to stop the defendants.

With respect we find the learned judge's approach on the issue to be correct in law and in fact.

As to the argument that there were more serious questions to consider relating to the need to protect the independence of the Judiciary and not to be preoccupied with the words used in the notice of 12 October 1999 and the

proposed resolution of 12 October 1999, with respect, we are unable to agree. We have already stated our reasons for agreeing with the contention that the convening of the proposed EGM was *ultra vires* the LPA. In short the Bar Council and the Malaysian Bar, as statutory bodies, had gone beyond the purpose of their incorporation.

Accordingly we find no reason to differ from the learned judge in his finding on contempt and we would say that this conclusion applies to both Appeal 75 and Appeal 521.

We note that earlier on this court in its unreported judgment when dealing with the appeal against the grant of the interlocutory injunction in respect of the first suit had said this (see: Rayuan Sivil No. W-02-47 Tahun 2000 and Rayuan Sivil No. W-02-48-Tahun 2000):

> The learned judge then proceeded to consider whether the preambles and the resolution "constitute possible contempt". For this, he referred to several cases from India, Singapore and Australia and then concluded thus:
>
> > To my mind such utterances as contained in the resolution are clearly contemptuous. It is obviously an attempt to erode public confidence in the Judiciary ...
>
> We agree with the learned judge.

And after referring to the following cases, namely, *Brahma Prakash v. State of U.P.* AIR [1954] SC 10; *Advocate General v. D. Seshagiri Rao* AIR [1966] Andhra Pradesh 167 and *Crown v. A. Rafique & Ors.* IR (37) 1950 Sind 1 the judgment concluded:

> We referred to the three above-mentioned cases as we feel that they would further support the correctness of the learned judge's conclusion that the resolution is clearly contemptuous. We would also stress that *Seshagiri Rao*'s case *(supra)* also held that in a proceeding for contempt the truth of the imputations is no defence at all.

With respect we have no reason to disagree with the views expressed therein.

Hence, we are not persuaded by the submissions advanced for the appellants and we find that the learned judge was not in error when he granted in respect of the first suit 'a declaration that the said EGM and the said proposed resolution constitute contempt of court.'

Sedition

On the issue of sedition the learned judge said (see: *Raja Segaran a/l*

S Krishnan v. Bar Council Malaysia & Ors [2004] 1 MLJ 34 para. 66):

> I have thoroughly discussed this heading in my earlier judgment (see *Raja Segaran a/l S. Krishnan v. Bar Council Malaysia & Ors* [2000] 5 CLJ 136). The unreported judgment of the Court of Appeal upheld my earlier views.

And in that earlier judgment (see: *Raja Segaran a/l S Krishnan v. Bar Council Malaysia & Ors* [2000] 5 CLJ 136) when allowing the application by the respondent for an interlocutory injunction the learned judge said:

> The conduct of the defendants and the members of the third defendant if allowed to attend the EGM and to discuss the resolutions would appear to constitute an offence under s. 4(1)(a) read together with s. 3(1)(c) of the Sedition Act 1948. However, it is not my duty to make any finding as to whether an offence has or has not been committed under the said sections. This is for the Public Prosecutor to decide, if at all. In any event, it is my judgment that the plaintiff in actual fact is protecting the defendants from plunging into an abyss from which they cannot emerge unscathed.

This court in its unreported judgment upheld the view of the learned judge with these words (see: Rayuan Sivil No. W-02-47 Tahun 2000 and Rayuan Sivil No. W-02-48-Tahun 2000):

> As regards the respondent's view that "the holding of the said EGM and/or the adoption of the said resolution would also constitute an offence under s. 3(l)(c) and 4(1)(a) of the Sedition Act 1948, we are of the opinion that the wordings of both the sections are so simple and clear that no reasonable man could ever disagree with the respondent's view.

We have already noted hereinabove the points submitted by Mr. Vijandran on the issue.

Raja Aziz in his submission on the issue questioned the standing of the respondent. Sedition being a crime it was his contention that only the Attorney General who could assert public rights and who could represent public interest but not the respondent.

Leaving aside the issue of locus standi which we will deal in greater detail later, it is our view that the short answer to the query of Raja Aziz is found in the final judgment of the learned judge when he said:

> … so long as he can show that the conduct of the defendants is such as to put him, the plaintiff, in peril of such similar prosecution that the defendants could face if the defendants' act is allowed to be consummated, the plaintiff need not wait to see the outcome, before acting. To protect his own interest he can take out an injunction to restrain the defendants and if the court is satisfied that the act complained of could give rise to the plaintiff facing criminal prosecution, the plaintiff ought to be allowed to use injunctive

measures to stop the defendants.

Further, we are in agreement with the view expressed by this court on the issue and reproduced hereinabove.

Thus, we find no merit in the grounds of appeal of the appellants and it is our judgment that the learned judge in respect of the first suit was correct in law when he allowed a 'Declaration that the said EGM and the said proposed resolution constitute offences under the Sedition Act 1948.' And to remove any doubt our conclusion equally applies to Appeal 521.

Locus Standi

On the issue of *locus standi* the argument marshaled for the appellants is that the respondent did not have substantive *locus standi* since it is the Attorney General alone who can institute criminal proceedings. This point was brought up in relation to the contention by the respondent that to allow the proposed EGM and the proposed general meeting to proceed would be contemptuous and seditious and ultimately would expose him to possible criminal prosecution.

It was also further asserted for the appellants that the respondent failed to show (threshold *locus standi*) that he would suffer special injury distinct from any possible injury that might be suffered by the rest of the members of the Malaysian Bar if the proposed EGM and proposed general meeting were to go ahead. Considerable reliance was placed upon the following cases: *Gouriet v. Union of Post Office Workers* [1978] LR 435; *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals* [1997] 4 CLJ 253 CA and *Government Of Malaysia v. Lim Kit Siang* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63.

Mr. Vijandran replied that the principle in *Gouriet (supra)* was not relevant to the facts of the present suits. Alternatively, he submitted that even if applicable the exceptions therein apply.

In elaborating why *Gouriet* was not applicable Mr. Vijandran listed the distinguishing factors, namely,:

(a) that *Gouriet* was not a member of the Postal Union but just an ordinary member of the public;

(b) that Gouriet did not allege special damage to him; and

(c) that *Gouriet*'s principle does not apply where an application for an injunction is by a member of a statutory body who seek to restrain *ultra vires* acts of the corporation notwithstanding the same acts may also be

illegal and/or criminal.

Learned counsel went on to say that in the instant appeals the respondent is a member of a statutory body, that is, the Malaysian Bar and thus entitled to restrain such body from *ultra vires* acts even if those acts are also criminal offences. A series of decided cases were then cited to support such a proposition, *inter alia*: *Simpson v. Westminster Palace Hotel Co.* (1860) 8 HL Cas 712; *Powell v. Kempton Park Racecourse* [1897] 2 QB 242; *Hoole v. Great Western Railway* [1867] 3 Ch App 262; *Jenkin v. Phamaceutical Society of Great Britain* [1921] 1 Ch. D 392; *Bermuda Cablevision Ltd. v. Colica trust Co. Ltd.* (PC) [1998] AC 198; *Bateman's Bay Local Aboriginal Land Council and Another v. Aboriginal Community Benefit Fund Pty Ltd and Another* 155 ALR 684.

Upon reading the judgment of the learned judge we would observe that he found *locus standi* for the respondent on the basis that:

> So long as the plaintiff has shown that he has the locus to make the application and so long as he can show that the conduct of the defendants is such as to put him, the plaintiff, in peril of such similar prosecution that the defendants could face if the defendants' act is allowed to be consummated, the plaintiff need not wait to see the outcome, before acting. To protect his own interest he can take out an injunction to restrain the defendants and if the court is satisfied that the act complained of could give rise to the plaintiff facing criminal prosecution, the plaintiff ought to be allowed to use injunctive measures to stop the defendants.

And in the earlier judgment of this court on the issue (see: Rayuan Sivil No. W-02-47 Tahun 2000 and Rayuan Sivil No. W-02-48-Tahun 2000) and which the learned judge referred to in his judgment, the view was expressed in this fashion:

> In the appeal before us, the respondent, as contended by the learned respondent's counsel, brought the action as a member of the Malaysian Bar and not as an ordinary member of the public. The EGM and the resolution expose Bar members (which include the respondent) to proceedings for contempt and to charges under the Sedition Act and consequently expenditure of funds to defend the proceedings and the charges. On the basis of these facts, we feel that *Gouriet*'s case is distinguishable and as the learned respondent's counsel contended, is not relevant to the appeal before us. Assuming that we are wrong here, we are of the view that the respondent had complied with the principles in *Gouriet*'s case. Lord Diplock in *Inland Revenue Commissioners v. National Federation of Self-employed & Small Businesses Ltd.* [1982] AC 617 at page 638 said:
>
> > As respects the claim for a declaration considerable reliance was placed upon the recent decision of this House in *Gouriet v. Union of Post*

> *Office Workers* [1978] AC 435, which held that a private citizen, except as relator in an action brought by the Attorney-General, had no *locus standi* in private law as plaintiff in a civil action to obtain either an injunction to restrain another private citizen (in casu, a trade union) from committing a public wrong by breaking the criminal law, or a declaration that his conduct is unlawful, *unless the plaintiff can show that some legal or equitable right of his own has been infringed or that he will sustain some special damage over and above that suffered by the general public*.
>
> We are satisfied that the respondent, as a Bar member, "will sustain some special damage over and above that suffered by the general public" if the injunction is not issued. It must at this juncture, be not forgotten that the respondent is a paying member of the Bar and payments are compulsory. He certainly has an interest in ensuring that the Bar does not involve itself in illegal activities or *ultra vires* acts.

There is no doubt that the doctrine of *locus standi* is far from settled. That was also the view of this court in *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors And Other Appeals (supra)*. Thus, accepting for a moment the present incoherent nature of the doctrine, there is much force in what Mr. Vijandran has submitted, that is, whether a member has the right to restrain a corporation from doing *ultra vires* acts. Incidentally from the excerpt hereinabove of the earlier judgment of this court that question appears to have been answered in the affirmative. And we agree. The element of being a member of a statutory body is vital to come to such conclusion. The question of special damage in such situation plays a minor role.

Anyway the above principle is not novel. In *Jenkin v. Phamaceutical Society of Great Britain (supra)* it was ruled that at common law a member of a society incorporated by Royal Charter is entitled to ask for an injunction to restrain the commission by the society of acts which are outside of the scope of the Charter and which might result in the forfeiture of the Charter and the destruction of the society. And quite recently that principle was referred to in the case of *Bermuda Cablevision Ltd. v. Colica trust Co. Ltd. (supra)* where Lord Steyn delivering the opinion of the Privy Council said this at p. 210:

> In a company law context a closer analogy than *Gouriet v. Union of Post Office Workers* [1978] AC 435 and *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] AC 173 is provided by the case of a company incorporated by Royal Charter. It has been held at common law that a member of such a society is entitled to an order restraining the commission of acts outside the scope of the charter which may result in the forfeiture of the charter and the destruction of the society: see *Jenkin v. Pharmaceutical Society of Great Britain* [1921] 1 Ch. 392, *Dickson v. Pharmaceutical Society of Great Britain* [1970] AC 403. That is not altogether dissimilar from the complaint of Colica that the unlawful carrying on of business by Cablevision puts at risk the licence which is the lifeblood of Cablevision. But their Lordships would not

press this analogy too far and would decide this point on a broader basis.

Accordingly we agree with Mr. Vijandran that the strict application of the principle in *Gouriet (supra)* does not arise in view of the facts and circumstances of the instant appeals before us.

We are also unable to agree that the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals (supra)* should be applied. As in *Gouriet* the respondent there was not a member of a statutory body or corporation seeking to prevent *ultra vires* acts.

To recap the respondent is a member of the Malaysian Bar and all he is asking is for this statutory body not to act beyond its statutory powers and duties. And premised on our concurrence that the proposed resolution of 12 October 1999, the holding of the proposed EGM and the proposed general meeting were *ultra vires* the LPA the question of *locus standi* of the respondent should not arise. It follows that there is no question of the civil court being asked to enforce any criminal law.

In any event it is also our opinion that the respondent had satisfied the 'special damage' test. Being a member of the Malaysian Bar he would definitely have been exposed to potential prosecution for sedition and contempt had the proposed EGM and the general meeting proceeded. The fact that he was only one of the many members should not negate his standing to sue on his own to ensure that he would not be exposed to unnecessary legal complexities. (See: *Bateman's Bay Local Aboriginal Land Council and Anor. v Aboriginal Community Benefit fund Pty Ltd and Anor.* 155 ALR 684).

Appeal 521

In view of our above conclusions on the main issues, initially, we were not inclined to consider the other aspect of the complaint of the appellants in this appeal. However on further perusal we think we need to address it since Appeal 521 deals with the grant of an interlocutory injunction by the learned judge. In other words, was the learned judge correct when he allowed the application?

Mr. Vijandran in arguing for Appeal 521 advanced his first contention in that the learned judge was correct in granting the interlocutory injunction on the basis of one particular issue. Learned counsel submitted that the learned judge was right in his approach by first seeking clarification from the appellants on the authenticity of the statements attributed to Dato' Dr. Rais Yatim and the then Chief Justice. And he went on to argue that since the appellants informed the learned judge that they were not concerned with the truth and in view of the legal implication arising from those statements in the context of the decision in *C. Ravichandran Iyer (supra)* which was followed by this court in its judgment in Rayuan Sivil No. W-02-47 Tahun 2000 and Rayuan Sivil No.

W-02-48-Tahun 2000 there was sufficient basis, even on a singular issue, to grant the interlocutory injunction.

Mr. Vijandran further submitted that the usual 'principles' guiding judges in considering applications for interlocutory injunction were not cast aside. He said that in exercising his discretion the learned judge considered the strong case established by the respondent premised on the unverified statements relied upon by the appellants to call for the proposed general meeting. On that score Mr. Vijandran submitted that there was no necessity for the learned judge to deal with every elements of the 'principles' as enunciated in *American Cyanamid Co. v. Ethicon Ltd* [1975] 1 All ER 504. And in any event learned counsel contended that the appellants did not challenge that the balance of convenience tilted in favour of the respondent bearing in mind the irreparable damages that could arise if the proposed general meeting were to proceed solely on the allegations contained in the unverified statements. Thus according to learned counsel there was no question of the learned judge having shifted the burden of proof when considering the application.

It was the grounds of appeal of the appellants that the learned judge did not go into the merits of the application and granted the interlocutory injunction based on preliminary point.

Now, the law on the grant or refusal of an interim injunction is clear. It involves the exercise of discretion. As to the mode of exercise pointers have been made as for instance in the case of *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 where it was outlined thus:

> To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) he must ask himself whether the totality of the facts presented before him discloses a bonafide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
>
> (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In

making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion' – per Gopal Sri Ram JCA at p 206.

The question to ask therefore is: whether the learned judge failed to observe any of the guidelines above before granting the interlocutory injunction?

In his judgment the learned judge after dismissing the preliminary objections raised by the appellants went on to consider the basis of the allegations upon which the appellants relied on to call for the proposed general meeting. And he concluded thus:

Is not this condemning a person even without hearing that person. If the Malaysian bar is not concerned with the truth or otherwise of the allegations but want to have this meeting only to satiate their hunger for a public debate

> over the chief justice by wresting the discussion from the general public and by so doing trying to show that they are protecting the sanctity of the judiciary, it seems to me that this effort is totally misconceived. To my mind there is no basis to call for an extraordinary general meeting on allegations attributed to someone who has not even been asked to verify its truth. There is no need for me to ask the plaintiff to even go into the merits of his application. On this one basic preliminary issue alone the 1st defendant has been unable to satisfy me. I therefore grant the plaintiff an order ...

At first blush the manner in which the learned Judge came to his conclusion appears to be inadequate. And it could have avoided unnecessary argument if he had laid down properly his analysis of the issues before him. But we hasten to add that there is no strict requirement that such analysis must be systematic and perhaps erudite. Hence, in the instant appeal having read the judgment of the learned judge as a whole we do not think it can be disputed that he did acknowledge there were serious issues to be tried such as whether the allegations were true or plain hearsay, whether there was any basis to call for the suspension of the then Chief Justice and the consequence of the acts of the appellants. And such trend of thought could be gleaned from his judgment albeit obliquely when he said:

> It seems to me that whilst the Malaysian bar is making a serious allegation by calling for the suspension of the chief justice or for his removal, they are prepared to do so on mere unsupported allegations without even giving any thought to the principle of natural justice by seeking confirmation from Datuk Dr. Rais Yatim if the contents of the report as contained in the newspaper cutting as attributed to him were actually spoken by him.

And in our view the learned judge did consider where the justice of the case should lie. He took into account public interest as well. In fact he balanced the damage that could arise if the proposed general meeting was held and the basis for its calling by referring to the decision in *C. Ravichandran Iyer (supra)*.

As regards damages it was contended for the appellants that expenses went to waste due to the grant of the interlocutory injunction. In our view no one should be blamed other than the appellants themselves. We agree with the learned judge when he said:

> The bar council in its public statement on the proposed general meeting of the bar said "the bar as the natural friends, protectors and guardians of the sanctity of the judiciary is left with no option but to examine the whole matter and proposed solutions at a general meeting". It seems paradoxical that having proclaimed itself as the friend, protector and guardian of the sanctity of the judiciary, the Malaysian bar has totally ignored the basic precept of failing in its duty to listen to the other side. It listened albeit to unsupported

statements allegedly attributed to the minister in the Prime Minister's Department and it rushed head on with its avowed aim of calling a meeting to discuss publicly no doubt within its confines, the conduct and behaviour of the highest official of the judiciary. Yet whilst pretending to protect the sanctity of the judiciary, it did not accord the chief justice the right to be heard before they even thought of convening this meeting.

Accordingly as a whole we do not think we can plainly say that the learned judge exercised his discretion erroneously given the circumstances of the case. We are therefore not prepared to interfere as it does not warrant our interference.

Conclusion For Appeals 75 And 521

We find therefore no merit in any of the complaints raised in these main appeals and hence we dismiss them.

Recusal – Appeal 512

This point comes under Appeals 512 which is an appeal against the decision of the learned judge dismissing a preliminary objection raised in connection with the application for interlocutory injunction under the second suit.

The thrust of the contention of the appellants is twofold. Firstly, that the learned judge should have recused from hearing the application since he had already made a decision on the same or very similar issues in the first suit, that is related to Appeal 75 herein and secondly that the same judge had earlier on heard and dismissed an application to amend the pleadings in another unrelated suit and which proposed amendment was subsequently incorporated into the defence in the first suit.

In other words it was the appellants' complaint that the learned judge should have not proceeded to hear the application for interlocutory injunction under the second suit since he had already decided on the same or very similar points in another suit between the same parties. Mr Loh for the appellants went on to point out the similarities in the relief sought for in the first and second suits to substantiate his argument.

And it is also the submission of Mr. Loh that this recusal point should not be relegated as mere academic issue since neither the supporting facts nor the substratum of the litigation giving rise to the issue have vanished nor ceased to exist. Further he submitted that the parties are still very much affected by the outcome of any decision, the costs remains at large, the parties are still very interested in the issue and a decision on the issue does not merely serve

as an obiter in relation to the error of an earlier decision.

Mr. Vijandran gave quite a short answer to this complaint. He did not deal with the contention that the issue had become academic and we think rightly so. Instead he submitted that the appellants had it all wrong as to the facts of the suits referred to. He began by pointing out that in the Memorandum of Appeal the reference to the case No. S2-23-42-96 by learned counsel for the appellants had nothing to do with the respondent or the first suit. Hence learned counsel argued that there was no ground for the submission of learned counsel for the appellants to sit on.

Alternatively, Mr. Vijandran submitted that there was no basis for the appellants to say that two similar cases were heard by the learned judge. According to learned counsel the facts of the suits referred to were different. And he contended that although the questions of law might be the same or similar, that should not debar the learned judge from hearing the suits.

In respect of the application to amend pleadings in another unrelated suit which allegations the appellants contended were subsequently incorporated into the defence of the first suit, Mr. Vijandran argued that what was before the learned judge then was purely an application to amend and not as to the truth of the allegations.

We note that the submissions of Dato' Loh on the issue were made with vigor and perhaps conviction. But having deliberated on the diverse arguments before us we are inclined to agree with the submissions of Mr. Vijandran. On his first point we are amenable to the view that it could have been just an oversight. Thus nothing turns on that. But there is much force in the alternative contention. Indeed it is clear that the two suits of the respondent were founded on two different sets of facts although the points of law may be similar. And no authority was cited to us enunciating a principle of law that would have been a basis for the learned judge in the instant appeal to recuse from hearing the second suit.

As to the argument that the learned judge had also heard the application to amend the pleadings in another unrelated suit which he then dismissed, we find such argument to be an obvious indication of being plainly averse to the learned judge regardless of the reason. For it is elementary that the criteria to consider in an application to amend pleadings are entirely different. There was also no assertion that the learned judge had ruled on the truth or falsity of the allegations which became part of the defence in the first suit when he was

considering the application to amend.

If we were to agree with the contentions of Dato' Loh then we might end up setting a precedent where no judge can hear any two cases with similar issues. That would be stretching too far the principles of law enunciated on when judges and arbiters should recuse from hearing cases. The primary questions to consider should be: whether 'there was a real danger of bias on the part of the learned trial judge' (see: *Mohamed Ezam bin Mohd. Nor & Ors. v. Public Prosecutor* [2001] 4 CLJ 701 FC) and whether the allegation and the factual circumstance could have 'caused a fair-minded and informed bystander to entertain a fear of real danger of bias' – (see: *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [2002] 4 CLJ 268; *Locabail (UK) Ltd. v. Bayfield Properties Ltd & Anor.* [2000] 1 All ER 65). Of course these questions would not be answered fairly by anyone who has a preconceived mind towards any particular judge or arbiter. In this instant appeal we find that the appellants have not succeeded in convincing us that their contentions bear the affirmative answers to those primary questions.

We note that the matter before the learned judge was only an application for an interlocutory injunction. Any allegation of bias may be premature. Indeed this court has opined before that in such a case 'a judge may grant an interlocutory injunction because he finds a particular line of defence taken to be untenable and yet, after hearing all the evidence and detailed argument at the trial, reach the opposite conclusion and dismiss the suit. I cannot help but think that such an occurrence is commonplace in our courts as it is indeed in other jurisdictions' (see: *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900).

For the foregoing reasons we find no merit in this instant appeal and we dismiss it.

Secrecy – Appeal 780

This appeal relates to the first suit. It revolves on the interpretation of s. 76(2) of the LPA. The appellants are dissatisfied that one Mr. R. Rajasingam who was then a member of the Bar Council was allowed to be called as a witness by the respondent during the hearing of the first suit and to answer a specific question, that is, whether the motion proposed by the Bar Council was the same as the proposed resolution of 12 October 1999 to be tabled during the proposed EGM.

Section 76(2) which came into force on 16 December 1983 *vide* the Legal Profession (Amendment) Act 1983 (Act A567/83) reads:

> (2) Except and in so far as may be necessary for the purpose of giving effect to any resolution passed or decision made, secrecy shall be maintained in all proceedings conducted by the Bar Council, the State Bar Committee, the Inquiry Committee and their staff.

It was the submission of Ms Sreenevasan that the section means what it says, namely, prohibition against disclosure of what transpired during any proceeding conducted by any of the entity referred thereto. And she argued that s. 123 of the Evidence Act 1950 (the Evidence Act) should not be applied. She cited the case of *Maju Holdings Sdn Bhd v. Kamala Devi a/p Ramadass & Anor And Another Appeal* [2003] 1 CLJ 434. But it should be noted that that case was dealing with secrecy under the Banking and Financial Institutions Act 1989 ('BAFIA').

The alternative argument presented was that even if the learned judge was right in relying on the provisions of the Evidence Act he failed to comply with the requirements of the provisions before admitting any evidence through Mr. R. Rajasingam.

In reply Mr. Vijandran submitted that the learned judge was right in his approach on the issue. He argued that s. 76(2) of the LPA regulates the interaction between members and should not be extended to court proceeding. He pointed out that that section did not oust the operation of the Evidence Act.

As regards the argument that there was no proper observation of the provisions of the Evidence Act before admitting the documentary evidence, Mr. Vijandran said that such point should only be considered if there was any challenge to the relevancy of such documents. Since there was none the argument should fail.

On this issue the learned judge said:

> Having gone through the various authorities, I held that it is the Evidence Act that determines the admissibility of any evidence in a Court of law, and in respect of this case I held that the relevant provisions for consideration ought to be sections 123 and 162(2) of the Evidence Act 1950. I also held that there was nothing in the LPA that excluded the application of the Evidence Act.
>
> I therefore held that the meaning of the word 'secrecy' given to section 76(2) of the LPA is that all decisions and discussions or resolutions passed that relate to investigations relating to the conduct or affairs (or complaints) against members of the Bar are the matters that ought to be kept secret to protect the interest of such members, lest the conduct and affairs of members or any complaints against any members be discussed by the Council or Committee

members in the open. I rejected the defendants' request to apply the literal interpretation to the meaning of the word 'secrecy'.

With respect the short answer to the complaint of the appellants is found in s. 2 of the Evidence Act which states:

This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

Hence, unless it is expressly excluded we are of the view that the provisions of the Evidence Act apply in any court proceedings. We find no expressed exclusion in s. 76(2). Accordingly ss. 118 and 136 would have been the provisions in answer to the objection when Mr. R. Rajasingam was called as a witness. Further there is no provision in the Evidence Act which allows a witness to rely on a statutory protection such as contained in s. 76(2).

We find no merit in this appeal and we dismiss it.

Order 33 – Appeal 647

For this appeal we have already summarized the complaint of the appellants hereinabove.

Mr. Vijandran in reply submitted that it was a matter of exercise of discretion by the learned judge. And he said that the issue as framed took into account the concerns of the appellants and would finally dispose of the action. As regards the calling of witnesses learned counsel argued that the learned judge gave the parties liberty to call witnesses.

In his judgment the learned judge ruled, *inter alia*:

I am of the view that the plaintiff was perfectly right to move this court under O. 33 r. 2 of the RHC. The issues and the grounds to back up the application are matters of law and if the defendants contend that they need to call witnesses, I had made an order allowing them to do so. After all since notice to cross-examine on the affidavit can be served to allow for oral evidence to be admitted, I did not see anything wrong in allowing the defendants the right to call any witness in support, instead of filing an affidavit …

…

Therefore where the court is of the view that the issues could be decided without the need for a prolonged trial, the court ought to move under O. 33 r. 2 to be read with r. 5. In respect of the defendants' submission, I hold that where contempt and sedition are concerned, intention or motive is irrelevant and immaterial. Therefore, the defendants' argument that evidence must be led to show intention and the motive for calling the EGM and moving the resolution, is no longer meritorious.

Before I could make a decision, counsel for the 2nd defendant then suggested that the proposed question should be as follows:

That whether the said EGM and the said proposed Resolution constitute contempt of court and whether the said EGM and the said proposed Resolution constitute offences under the Sedition Act 1948 and if the answers to the said two questions are yes then whether the said EGM and the said proposed Resolution are *ultra vires* the LPA 1976?

I took this to mean that the 2nd defendant at least was conceding to the approach taken by the plaintiff in proceeding under O. 33 r. 2 of the RHC, except that he wished the question to be rephrased as suggested by the 2nd defendant. It was indeed a surprise when I received notification of the appeal.

In any case, I was completely satisfied that this case should proceed under O. 33 r. 2 read together with r. 5 …

...

I also ordered that parties, if they wished, be permitted to adduce oral evidence; otherwise the case to proceed based on the pleadings, the affidavits filed, and the Agreed Statement of Facts ("B").'

First the law. For O. 33 of the Rules to apply the issues in a case should be clear and not riddled with complexities and the facts should not be in dispute. 'Where the issues on point of law to be decided involve the consideration of facts, resort to O. 33 r. 2 is inappropriate. It is undesirable to resolve such issues on a purely hypothetical state of facts' – (see: *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321); *Arab Malaysian Finance Bhd v. Meridien International Credit Corporation Ltd London* [1993] 4 CLJ 307).

It appears that the main complaint of learned counsel for the appellants is that O. 33 should not have been applied since intention and motive are necessary ingredients before any finding for contempt and sedition can be arrived at. Otherwise there were hardly any disputed facts on the issues to be determined especially with the Agreed Facts 'B' as amended available.

Now, it was held that *mens rea* is not an element that has to be proved to establish contempt. And neither is motive. This view was expressed by this court in *Murray Hiebert v. Chandra Sri Ram* [1999] 4 CLJ 65. And we reaffirm that view.

Since it is only for the purpose of establishing intention or motive that the

Appellants might call witnesses we find therefore that the learned judge was right in allowing the invocation of O. 33.

Similarly, for sedition the 'intention of the accused when he made the speech and used words which are alleged to be seditious is not material or relevant for it is provided in s. 3(3) of the Sedition Act that the intention of the speaker shall be deemed to be irrelevant if in fact the words have a seditious tendency' per Ajaib Singh J (as he then was) in *Public Prosecutor v. Oh Keng Seng* [1979] 2 MLJ 174. The then Federal Court affirmed the decision of the High Court. (See: *Oh Keng Seng v. Public Prosecutor* [1980] 2 MLJ 244).

Accordingly we find no reason to fault the learned judge in proceeding with the hearing of the first suit by way of O. 33. Our inevitable conclusion is that this appeal is dismissed as we find no merit in the complaint thereof.

Overall Conclusion

For the reasons given we dismiss these appeals. And since these appeals were filed separately though before us they were heard jointly, it is only appropriate that we allow costs to each of the appeals to be taxed and paid to the respondents. Deposits paid to account for taxed costs.